

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number _____

Meeting Type: Regular

Meeting Date: 10/11/2012

Action Requested By:
Legal

Agenda Item Type
Resolution

Subject Matter:

Settlement of Lawsuit

Exact Wording for the Agenda:

Resolution authorizing the Mayor to execute a settlement agreement in that certain case styled Echols Properties, LLC v. the Huntsville Historic Preservation Commission, et al., Case No. CV-2012-900691.00.

Note: If amendment, please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what Council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost:

Budgeted Item: Not applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head: 

Date: 10/8/2012

RESOLUTION NO. 12-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and he is hereby authorized to execute a Settlement Agreement by and between the City of Huntsville, Alabama, and Echols Properties, LLC, on behalf of the City of Huntsville, a municipal corporation in the State of Alabama, which said agreement is substantially in words and figures similar to that certain document attached hereto and identified as "Settlement Agreement between the City of Huntsville, Alabama and Echols Properties, LLC, in that certain case styled Echols Properties, LLC, v. The Huntsville Historic Preservation Commission, et al., Case No. CV-2012-900691.00," consisting of nineteen (19) pages including Exhibits, and the date of October 11, 2012, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, an executed copy of said document being permanently kept on file in the Office of the City Clerk-Treasurer of the City of Huntsville, Alabama.

BE IT FURTHER RESOLVED that authorization to execute this Settlement Agreement is expressly conditioned upon approval of the Settlement Agreement by The Huntsville Historic Preservation Commission at its meeting set for October 15, 2012.

ADOPTED this the 11th day of October, 2012.

President of the City Council of
the City of Huntsville, Alabama

APPROVED this the 11th day of October, 2012.

Mayor of the City of
Huntsville, Alabama

SETTLEMENT AGREEMENT

This Settlement Agreement (the "**Agreement**") is entered into by, between and among ECHOLS PROPERTIES, L.L.C. ("**Echols**"); the City of Huntsville, Alabama (the "**City**"); the Huntsville Historic Preservation Commission (the "**HHPC**"); Ralph Allen; Marie Bostick; Randy Cunningham; David Ely; Judy Perszyk; and Jan Williams (collectively, the "**Parties**"), as of the ____ day of _____, 2012.

WHEREAS, the Parties desire to settle fully and finally all differences arising out of Echols's applications for approval to construct a house at 415 Echols Avenue, and specifically the lawsuit filed by Echols in the Circuit Court of Madison County, Alabama styled *Echols Properties, L.L.C. v. The Huntsville Historic Preservation Commission, et al.*, Case No. CV-2012-900691.00 (the "**Lawsuit**").

NOW, THEREFORE, in consideration of the premises, which are hereby incorporated by reference, the mutual promises set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed as follows:

1. **Consideration.** As consideration for this Agreement, Echols, the City, and the HHPC have agreed to the following:

- a. At the HHPC meeting on October 8, 2012 (the "**Meeting**"), the HHPC will approve the application attached hereto as Exhibit "A" (the "**Application**"), subject to approval of this Agreement by the City Council.
- b. As soon as practicable on a business day following the approval of this Agreement by the City Council,¹ and in no event later than October 12, 2012, a certificate of appropriateness shall be issued from the HHPC to Echols, and the City will issue a building permit to Echols, approving the construction of a house at 415 Echols Avenue in accordance with the Application (the "**Echols House**").
- c. Promptly after issuance of both the certificate of appropriateness and the building permit, Echols will dismiss the Lawsuit with prejudice, including all of its claims against the City, the HHPC, Ralph Allen, Marie Bostick, Randy Cunningham, David Ely, Judy Perszyk, and Jan Williams (collectively, the "**Defendants**"), costs (including attorneys' fees) to be taxed as paid.

2. **Limited Agreement by the Individual Defendants.** This Agreement shall not require or otherwise obligate Ralph Allen, Marie Bostick, Randy Cunningham, David Ely, Judy Perszyk, and/or Jan Williams (collectively, the "**Individual Defendants**") to vote to approve the

¹ "Business day" is defined as any day other than a Saturday, Sunday, or State Holiday (as determined by the Official State of Alabama Calendar).

President of the City Council of the
City of Huntsville, Alabama
Date: _____

Application. Nevertheless, as consideration for Echols's agreement to dismiss all of its claims against the Individual Defendants as discussed in Paragraph 1, Subsection (c), *supra*, the Individual Defendants agree to be bound by the other provisions of this Agreement, including, but not limited to, the provisions related to good faith, fair dealing, and release of Echols from liability.

3. Representations of Echols. Echols expressly represents and warrants to the Defendants that the Application reflects the following changes from the design documents attached to the applications submitted by Echols to the HHPC in November of 2011 (the "2011 Application") and/or May of 2012 (the "2012 Application"), each of which are true and correct: (a) the Echols House is two feet seven inches lower as measured from the street when compared to the 2011 Application; (b) the building height of the Echols House has been reduced by approximately one foot when compared to the 2012 Application; (c) the driveway at the front door of the Echols House has been lowered by one foot six inches when compared to the 2012 Application; (d) the basement floor of the Echols House has been raised approximately one foot six inches when compared to the 2012 Application; (e) the body of the Echols House is nine and three eighth inches farther back from the street when compared to the 2012 Application; and (f) the Echols House has been moved approximately five feet to the right when facing the house from the street when compared to the 2012 Application. Echols acknowledges that the Defendants have materially relied on the foregoing representations in entering into this Agreement.

4. Representations of Defendants. HHPC expressly represents and warrants to Echols that no further action, approval or permit shall be required from it for construction of the Echols House according to the plans submitted with the Application. The City represents and warrants to Echols that no further action, approval or permit shall be required from it for construction of the Echols House according to the plans submitted with the Application; however, Echols will have to comply with the laws of the State of Alabama and the ordinances and codes of the City during and after the construction of the Echols House, including, without limitation, ordinances, codes, and/or laws that require inspection by the City Inspection Department, the Fire Marshall, etc. Defendants represent and warrant that they will take no action to interfere with the rights conferred upon Echols by this Agreement and/or the certificate of appropriateness and building permit to be issued incident hereto, except to enforce the laws of the State of Alabama and the ordinances and codes of the City. Defendants acknowledge that Echols has materially relied on the foregoing representations in entering into this Agreement.

5. Echols's Release. Echols, on its behalf and for its members, representatives, officers, employees, and agents, hereby releases and forever discharges Defendants, and all of their members, officers, agents, employees, and representatives, from any and all claims or potential claims for relief of whatever nature, known or unknown, that were asserted or might have been asserted in the Lawsuit.

6. Defendants' Release. Defendants, on their behalf and for their members, representatives, officers, employees, and agents, hereby release and forever discharge Echols and all of its members, representatives, officers, employees, and agents from any and all claims or potential claims for relief of whatever nature, known or unknown, that were asserted or might have been asserted in the Lawsuit.

7. Advertising, Notice, Application Fee Requirements. By virtue of this Agreement, any and all requirements of advertising, notice, and application fee are not applicable to Echols's submission of the Application.

8. Attendance. The HHPC agrees that a representative of Echols is not required to attend the Meeting, and the Parties agree that the Application may be presented for consideration to the HHPC by any of the attorneys for any of the Parties.

9. Good Faith. The Parties all agree that they will act in good faith in any future dealings with one another, including, without limitation, required inspections, the certificate of occupancy and any future matter involving the City or the HHPC, such as proposed changes or modifications to the Echols House.

10. Retaliation. Defendants agree not to retaliate against Bill Propst, Jr., Echols, or any of its members, representatives, officers, employees, or agents for the filing of the Lawsuit.

11. No Admission of Liability. Nothing in this Agreement is intended to be construed or should be construed as an admission of liability by Echols or Defendants, and Echols and Defendants expressly deny any liability or any admission of liability that may be attributed to any of them by virtue of this Agreement.

12. Attorneys' Fees. In entering into this Agreement, Echols and Defendants acknowledge that each party is to bear their own attorneys' fees and costs related to the Lawsuit, and that no claim for such may be made at any subsequent time.

13. Enforcement of Agreement. If an action or proceeding must be commenced in order to enforce this Agreement, then the prevailing party in such action or proceeding shall be entitled to have its reasonable attorneys' fees and costs incurred in said action or proceeding promptly reimbursed by the non-prevailing party.

14. Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of the Parties, and, as applicable, their respective members, officers, agents, employees, representatives, successors, and/or assigns.

15. Entire Agreement. The Parties represent and acknowledge that no promise, inducement or agreement other than is expressed herein has been made and that this Agreement contains the entire understanding and agreement of the parties, and that this Agreement

supersedes all prior representations and understandings, whether written or verbal, not contained specifically in this Agreement.

16. Modification. This Agreement cannot be modified, amended, terminated or otherwise changed in any way or manner, unless it is done pursuant to a written document or documents signed by the Parties. No oral modification of this Agreement will be deemed valid or binding under any circumstances.

17. Severability. Should any part of this Agreement be declared by any court or arbitrator of competent jurisdiction to be illegal, invalid or unenforceable, the remainder of this Agreement shall remain valid and in effect, and the invalid provision shall not be deemed to be a part of this Agreement.

18. Interpretation. The Parties agree that this Agreement shall be interpreted according to the plain and ordinary meaning of its terms. Additionally, the Parties agree that they participated equally in the negotiation and drafting of this Agreement and, as a consequence thereof, no inference shall be drawn that this Agreement was prepared by any particular party and no ambiguity shall be construed against any particular party.

19. Advice of Counsel. In entering into this Agreement, the Parties represent that they have consulted with their own attorneys, who are the attorneys of their choice, and that the terms of this Agreement have been approved by said attorneys; have been completely read and explained to them by their attorneys; and are fully understood and voluntarily accepted by them. The Parties further acknowledge that they have had sufficient opportunity to consult with an attorney(s) regarding the legal effect of this Agreement, including the releases, and each party acknowledges that they are satisfied with this Agreement and fully understand its terms and effect.

20. Governing Law; Jurisdiction. This Agreement shall be governed by, construed, interpreted and enforced in accordance with the laws of the State of Alabama, and the Parties hereby consent to the jurisdiction of the state courts located in Madison County, Alabama, for the resolution of any and all disputes arising from this Agreement.

21. Counterparts; Effective Date. This Agreement may be executed in counterparts. This Agreement shall become effective and binding on the Parties upon approval of this Agreement by a majority vote of the HHPC; approval of this Agreement by a majority vote of the City Council of the City of Huntsville, Alabama; and execution of this Agreement by the Parties. In the event the HHPC or the City Council of the City of Huntsville, Alabama fails to approve this Agreement, the releases and the obligations herein shall be of no force and effect and Echols shall have the right to pursue its claims in the Lawsuit.

IN WITNESS WHEREOF, the undersigned hereby execute this Agreement.

[signature pages to follow]

[SIGNATURE PAGE FOR ECHOLS PROPERTIES, LLC]

ECHOLS PROPERTIES, LLC

By: [Signature]

Its: Manager

STATE OF ALABAMA)
)
COUNTY OF MADISON)

I, a Notary Public in and for said County in said State, hereby certify that William S. Probst, the Manager of ECHOLS PROPERTIES, LLC, a Delaware limited liability company, is signed to the foregoing, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing, he, as such officer and with full authority, executed the same voluntarily for and as the act of said limited liability company.

Give under my hand and official seal of office this 4th day of October, 2012.

Notary Public: Dannela Pauline Asher

My commission expires: 5.5.2013

[NOTARY SEAL]



[SIGNATURE PAGE FOR CITY OF HUNTSVILLE, ALABAMA]

CITY OF HUNTSVILLE, ALABAMA

By: _____

Its: _____

STATE OF ALABAMA)

COUNTY OF MADISON)

I, a Notary Public in and for said County in said State, hereby certify that _____, the _____ of CITY OF HUNTSVILLE, ALABAMA, is signed to the foregoing, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing, he, as such officer and with full authority, executed the same voluntarily for and as the act of said municipality.

Give under my hand and official seal of office this _____ day of _____, 2012.

Notary Public _____

My commission expires: _____

[NOTARY SEAL]

**[SIGNATURE PAGE FOR HUNTSVILLE HISTORIC
PRESERVATION COMMISSION]**

**HUNTSVILLE HISTORIC PRESERVATION
COMMISSION**

By: _____

Its: _____

**STATE OF ALABAMA)
)
COUNTY OF MADISON)**

I, a Notary Public in and for said County in said State, hereby certify that
_____, the _____ of HUNTSVILLE
HISTORIC PRESERVATION COMMISSION, is signed to the foregoing, and who is known to
me, acknowledged before me on this day that, being informed of the contents of the above and
foregoing, he, as such officer and with full authority, executed the same voluntarily for and as
the act of said commission.

Give under my hand and official seal of office this _____ day of _____, 2012.

Notary Public _____

My commission expires: _____

[NOTARY SEAL]

[SIGNATURE PAGE FOR RALPH ALLEN]

RALPH ALLEN

STATE OF ALABAMA)
)
COUNTY OF MADISON)

I, a Notary Public in and for said County in said State, hereby certify that _____, is signed to the foregoing, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing, he executed the same voluntarily.

Give under my hand and official seal of office this _____ day of _____, 2012.

Notary Public _____

My commission expires: _____

[NOTARY SEAL]

[SIGNATURE PAGE FOR MARIE BOSTICK]

MARIE BOSTICK

STATE OF ALABAMA)
)
COUNTY OF MADISON)

I, a Notary Public in and for said County in said State, hereby certify that _____, is signed to the foregoing, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing, she executed the same voluntarily.

Give under my hand and official seal of office this ____ day of _____, 2012.

Notary Public _____

My commission expires: _____

[NOTARY SEAL]

[SIGNATURE PAGE FOR RANDY CUNNINGHAM]

RANDY CUNNINGHAM

STATE OF ALABAMA)
)
COUNTY OF MADISON)

I, a Notary Public in and for said County in said State, hereby certify that _____, is signed to the foregoing, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing, he executed the same voluntarily.

Give under my hand and official seal of office this ____ day of _____, 2012.

Notary Public _____

My commission expires: _____

[NOTARY SEAL]

[SIGNATURE PAGE FOR DAVID ELY]

DAVID ELY

STATE OF ALABAMA)

COUNTY OF MADISON)

I, a Notary Public in and for said County in said State, hereby certify that _____, is signed to the foregoing, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing, he executed the same voluntarily.

Give under my hand and official seal of office this ____ day of _____, 2012.

Notary Public _____

My commission expires: _____

[NOTARY SEAL]

[SIGNATURE PAGE FOR JUDY PERSZYK]

JUDY PERSZYK

STATE OF ALABAMA)
)
COUNTY OF MADISON)

I, a Notary Public in and for said County in said State, hereby certify that _____, is signed to the foregoing, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing, she executed the same voluntarily.

Give under my hand and official seal of office this ____ day of _____, 2012.

Notary Public _____

My commission expires: _____

[NOTARY SEAL]

[SIGNATURE PAGE FOR JAN WILLIAMS]

JAN WILLIAMS

STATE OF ALABAMA)
)
COUNTY OF MADISON)

I, a Notary Public in and for said County in said State, hereby certify that _____, is signed to the foregoing, and who is known to me, acknowledged before me on this day that, being informed of the contents of the above and foregoing, he executed the same voluntarily.

Give under my hand and official seal of office this _____ day of _____, 2012.

Notary Public _____

My commission expires: _____

[NOTARY SEAL]

Exhibit "A"

HUNTSVILLE HISTORIC PRESERVATION COMMISSION	
P. O. BOX 308 HUNTSVILLE, ALABAMA 35804-0308	
DATE OF SUBMISSION: _____	APPLICATION FEE \$15.00 <u>WAIVED</u> PAID
_____ (Date of Meeting)	Request is to <input type="checkbox"/> demolish <input checked="" type="checkbox"/> erect <input type="checkbox"/> alter <input type="checkbox"/> repair property. <input checked="" type="checkbox"/> paint
Location: <u>415 Echols Ave.</u>	
Owner's Name: <u>Echols Properties, L.L.C.</u>	
Owner's Mailing Address: <u>c/o Maynard Cooper & Gale, P.C.</u>	
Owner's Telephone Number: <u>P.O. Box 18668 Huntsville, AL 35804</u>	
Brief description of work to be performed: <u>Construction of private residence</u> <u>pursuant to plans attached hereto.</u>	
Appellant <input type="checkbox"/> Owner <input type="checkbox"/> Architect <input type="checkbox"/> Contractor If other than owner a letter of authorization is required.	Street Address _____ City, State, Zip Code _____ Telephone Number _____
Disposition by Huntsville Historic Preservation Commission: <input type="checkbox"/> Approved <input type="checkbox"/> Disapproved <input type="checkbox"/> Approved as modified: _____ _____ (Date)	
Applications must be submitted to the City of Huntsville Inspection Department, 320 Fountain Circle, the last Monday of the month prior to the meeting. The meetings are held in the Public Services Building at 320 Fountain Circle in the 1 st floor Conference Room at 4:30 p.m. the second Monday of each month. All required data must be submitted with this application, incomplete applications may be denied. SOMEONE MUST BE PRESENT AT THIS MEETING OR THE REQUEST WILL BE DENIED. _____ (Time) (Date)	

**CHECK LIST FOR SUBMITTALS TO THE
HUNTSVILLE HISTORIC PRESERVATION COMMISSION**

1. This submittal involves:

- ☐ Renovation, with minor changes – site plan required
- ☐ Alterations/repairs to existing construction – site plan maybe required
- ☐ Additions to existing construction – site plan required
- ☐ Complete demolition of existing construction – site plan required
- ☐ Partial demolition of existing construction – site plan required
- ☒ New building(s) or outbuilding(s) – site plan required
- ☒ Fence – site plan required
- ☐ Required zoning variance(s) due to: set backs, property use, other – site plan required
- ☒ Altered or new site features such as planting, drives, parking lots, walks, walls, etc. – site plan required
- ☒ New swimming pool – site plan required
- ☐ New dish antenna – site plan required
- ☐ Sign(s) and lighting for same – site plan required
- ☒ Paint (see below)
- ☐ Other
(describe) _____

2. Brand name, manufacturer's color designation and physical is required for:

- ☒ Siding paint (manufacturer's color chip)
- ☒ Trim paint (manufacturer's color chip)
- ☒ Shutter paint (manufacturer's color chip)
- ☐ Other painted items (manufacturer's color chip)
- ☒ Manufactured pre-finished material such as: shingles (wall or roof), brick
- ☒ other (describe)

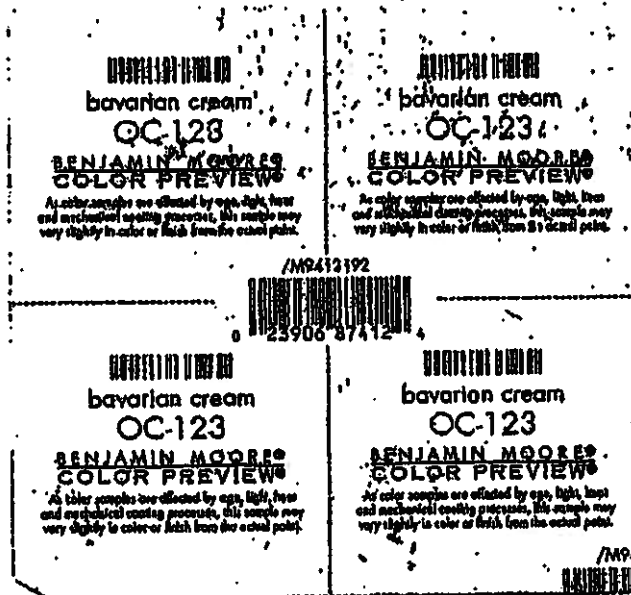
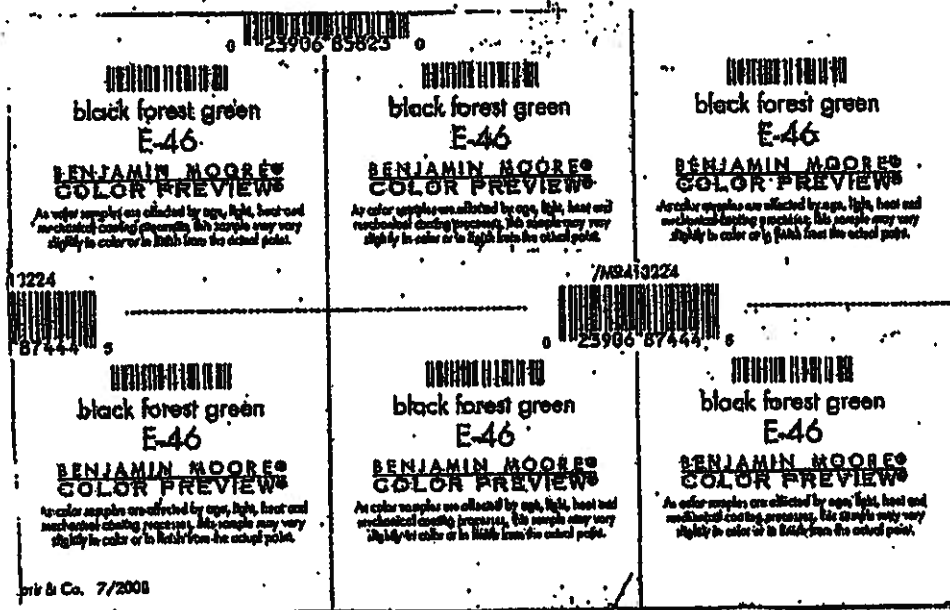
Benjamin Moore
Bavarian Cream
Benjamin Moore
Black Forest Green
(Charleston Black Green)
"aged copper"
roof
light
gray cast
stone
oyster bay brick

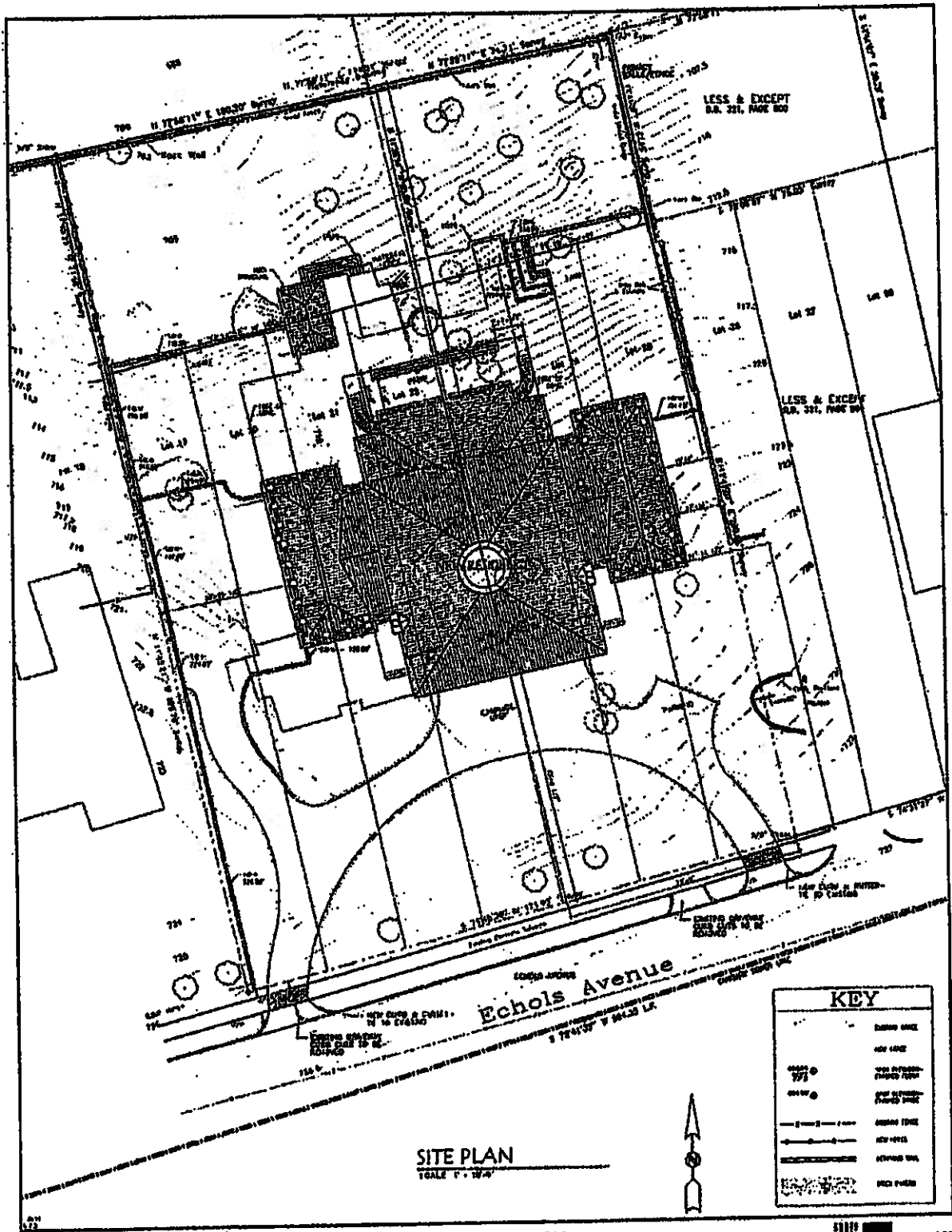
3. Drawings included to provide a close assessment of the building and work sites (8 1/2 x 11)

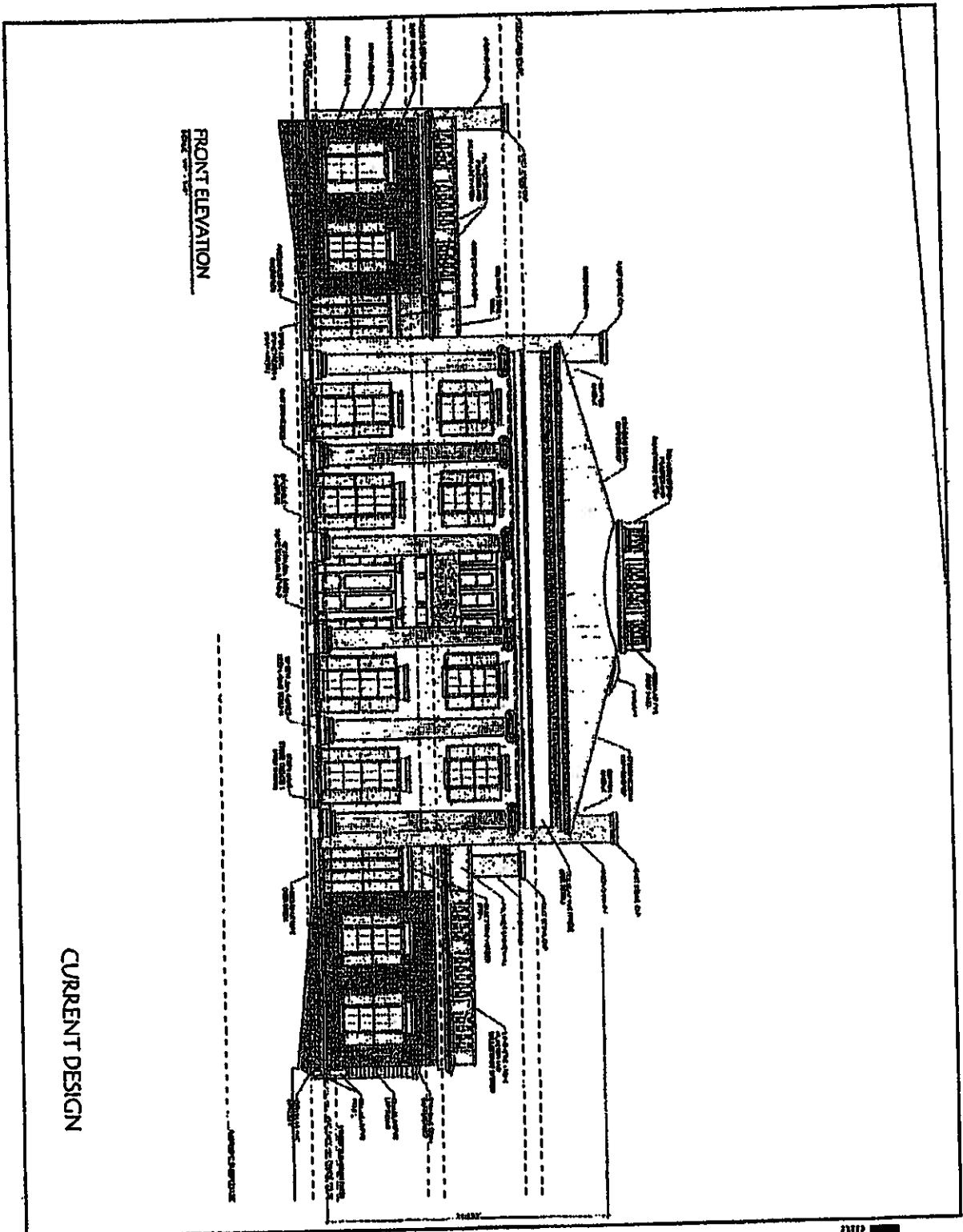


4. Photographs included to provide a close assessment of the existing and nearby conditions









A NEW RESIDENCE FOR
MR. BILL PROPST, JR.
HUNTSVILLE, ALABAMA



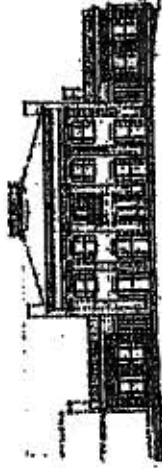
A4.1

PROPST RESIDENCE, HUNTSVILLE, ALABAMA

CURRENT DESIGN



428 E. 1st Avenue



428 E. 1st Avenue



428 E. 1st Avenue



ROUTING SLIP CONTRACTS AND AGREEMENTS

Originating Department: Legal

Council Meeting Date: 10/11/2012

Department Contact: Peter Joffrion

Phone # 427-5026

Contract or Agreement: Settlement Agreement

Document Name: Settlement Agreement of Echols Properties v. City of Huntsville

City Obligation Amount:

Total Project Budget:

Uncommitted Account Balance:

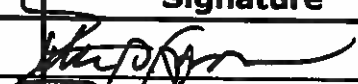

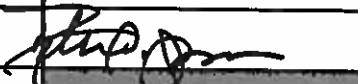
Account Number:

Procurement Agreements

<u>Not Applicable</u>	<u>Not Applicable</u>
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Grant-Funded Agreements

<u>Not Applicable</u>	Grant Name:
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Department	Signature	Date
1) Originating		10-8-12
2) Legal		10-8-12
3) Finance		
4) Originating		10-8-12
5) Copy Distribution		
a. Mayor's office (1 copies)		
b. Clerk-Treasurer (Original & 2 copies)		